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IN THE

Supreme Court of the United States

October Term, 1969
No. 451

TRANSPORTATION UNLIMITED OF CALIFORNIA, INC., a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, MIDWEST COAST TRANSPORT, INC., RINGSBY TRUCK LINES, INC., REFRIGERATED FOODS, INC., CURTIS, INC., LITTLE AUDREY'S TRANSPORTATION CO., INC., FROZEN FOODS EXPRESS, INC., and YELLOW FREIGHT SYSTEM, INC. (Successor to Watson-Wilson Transportation Co., Inc.),

Appellees.

On Appeal From the United States District Court for the Central District of California.

BRIEF OPPOSING MOTION TO AFFIRM.

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This Brief is filed in opposition to appellees' Motion to Affirm pursuant to Rule 16, Paragraph 4 of the Rules of the Supreme Court of the United States.

Appellees uniformly misinterpret, misconstrue or misunderstand appellant's basic contentions by asserting an attempt by appellant to excuse itself from application of the principles and holdings of the Court in *Interstate Commerce Commission v. J-T Transport Com-*

pany, Inc., 368 U.S. 81, 14 F.C.C. 81,409. *(M.A.-L.A., pp. 2 and 7; M.A.-Midwest, pp. 6-7; M.A.-S.G. & I.C.C., p. 4). The thrust of appellant's contention is *not* that the five criteria of Section 309(b) (49 U.S.C. 309(b)) are *inapplicable* but that the quantum of proof under the said five criteria varies depending upon the type of contract carriage as defined in Section 303(a) 15(a) or 303(a) 15(b).

Appellees circumvent appellant's contention that the 309(b) criteria, admittedly applicable to contract carrier applications under 303(a) 15(a), were applied by the Commission and the lower Court under a *dual* supporting shipper circumstance and not under a *single* shipper support situation. The effect of such application of the law was to deny appellant substantive due process of law under the Fifth Amendment to the United States Constitution. Declaration by appellees that the "inadvertent error in the (lower) Court's factual recitation is of no moment" is completely refuted by the said lower Court's adoption of the findings of fact by the Commission (M.A.-L.A., p. 4). (emphasis added).

None of the appellees squarely meet the vital issue of the failure of the Commission to apply the first criteria of 309(b), i.e., the number of shippers to be served, save as to meeting the definition of the con-

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*M.A.-L.A. refers to Motion to Affirm of Appellees Little Audrey's Transportation Co., Inc. and Yellow Freight System, Inc. (successor to Watson-Wilson Transportation Co., Inc.);

M.A.-Midwest refers to Motion to Affirm of Appellees Midwest Coast Transport, Inc., Ringsby Truck Lines, Inc., Refrigerated Foods, Inc., and Curtis, Inc.;

M.A.-S.G. and I.C.C. refers to Motion to Affirm of Appellees Solicitor General and Interstate Commerce Commission.

tract carriage requirement of Section 303(a) 15(a). Appellees argue that appellant contends a single shipper service would automatically meet the essential requirement of consistency with the public interest and the National Transportation Policy (M.A.-L.A., p. 4; M.A.-Midwest, p. 9). Such assertions are proffered to beguile and mislead the true import of appellant's contention that upon the application of the first criteria to the ultimate fact of a single supporting shipper—in such case "it would be impossible to make any stronger showing *under the test involved*" *Meat Packers Express, Inc.-Extension-Dennison,* 100 M.C.C. 401 (on remand), 1966 F.C.C. 35,978 (emphasis added). Thus, as the *J-T* case holds "there is no room for a presumption in favor or against any of the five factors", so should there be no failure to weigh or balance any one of the five factors in determining consistency with the public interest and the National Transportation Policy as required by Section 309(b).

Again, appellees attempt to minimize the argument that the Commission and the lower Court, in espousing the Hearing Examiner's finding that the *shippers* failed to establish that the appellee carriers are unable or unwilling to provide services needed by the shippers (J.S. Exhibit B, p. 31), do no less than impose the burden upon appellant to establish inadequacy of existing services, manifestly contrary to this court's holding in the *J-T* case, *supra* (M.A.-L.A. pp. 5-6; M.A.-Midwest, pp. 9-10). It is interesting to note at this juncture that appellees have, by editorial license, limited the Examiner's finding to the *singular* shipper instead of the *plural* shippers. The effect of such finding can hardly be other than, as appellant contends, a misapplication

of the second criteria of Section 309(b), namely: the nature of the service proposed.

Appellees' motions are singularly devoid of any response to appellant's argument that the Commission and the lower Court, with respect to the third criteria (the effect which granting the permit would have upon the services of protesting carriers), patently misapplied said criteria and the *J-T* case holdings, in failing to recognize the import of the fact that: (1) appellees are not now transporting the traffic involved, hence no diversion from the supporting shipper; (2) the supporting shipper would not use appellees' services if the permit were denied; and (3) this is not the "unusual case" as to cause adversity to appellee protesting carriers (*J-T* case, *supra,* 368 U.S. at 93). Yet, the Commission and the lower Court found a grant of the application *could* adversely effect the operations of existing carriers inasmuch as a *portion* of the traffic (only of Bennett) would be subject to diversion (J.S. Exhibit B, pp. 21-2) (emphasis added). At any rate, any adverse effect which a grant of authority might have upon the appellees' services would be outweighed by the advantages to the supporting shipper of having appellant's service available. *Meat Packers Express Case, supra.* Again, the Commission and the Court's application of the said criteria was accomplished in the light of multiple shippers and not a single shipper, and as such, cannot be waved away as "an equal and separate consideration to each of the shippers" as appellees would

like the Court to believe (M.A.-L.A. p. 4; M.A.-Midwest, pp. 8, 9 and 11).

Assuming, arguendo, that denial of application would have no apparent adverse effect upon appellant, the fourth criteria—effect of denial upon appellant and/or its shipper, such a denial would deprive the shipper of a service particularly well suited to meet its transportation needs. In *Earl Dibble Contract Carrier Application*, 92 M.C.C. 610 at 616, the Commission stated:

> ". . . hence a denial of the application would . . . impel it (shipper) to continue the utilization of its proprietary operations, a service . . . it desires to curtail. Furthermore, proprietary trucking is a form of carriage which, regardless of the circumstances, contract carriage ought to be free completely and satisfactorily to replace" (emphasis added).

To argue blithely that the Commission's use of the word "shippers" in place of the singular form was of no consequence or significance, or that there is no basis to conclude that the finding that a denial would have no apparent adverse effect upon the shippers "gave equal and separate consideration to each of the shippers", without argument or support thereof, is to beg the basic issue and contention of appellant that the very consideration of the five criteria under Section 309(b) was performed in the light of a plurality of shippers, rather than a single supporting shipper. Such misapplication culminated in a requirement that all five criteria must be met for *each* shipper prior to the grant of authority, rather than as provided by Section 309(b)

that . . . "a permit shall be issued to any qualified applicant therefore, authorizing in *whole or in part* the operations covered by the application . . ." (Section 309(b), J.S., Exhibit B, p. 41).

A reading of the Commission's finding, without supporting evidence, that there is "no evidence regarding any *significant* change in the character of either shipper's requirement that the *protestants would be unable or unwilling to meet*" (J.S., Exhibit B, p. 32) (emphasis added) evidence, *per se*, a finding that there is some change in the character of either shipper's requirements. In addition, the requirement that appellant demonstrate that appellees would be "unable or unwilling to meet" once again evidences the placement of an impermissible burden upon appellant to establish that the existing services are inadequate, and that appellant demonstrate a unique, different or distinctive type of *service* which cannot or will not be performed by appellees (J.S. Exhibit p. 31).

Thus, it is obvious that although the five criteria of 309(b) were recognized and enunciated by the Commission in its Decision and Order adopted by the Three-Judge Court below, such recognition and announcement did not automatically guarantee *proper* consideration by the Commission and Court, particularly when the scales upon which the said five criteria were to be weighed were "improperly balanced," thus culminating in a misapplication of the criteria under an incorrect assumption of the existence of facts to which the said criteria

were applied. As a consequence, such improper or misapplication of the law was a denial to appellant of substantive due process in the violation of the Fifth Amendment of the Constitution.

It is submitted that the Court should not allow such arguments as propounded by appellees to persuade it to dispose of this appeal without plenary consideration, and, accordingly, probable jurisdiction of the appeal should be noted.

Respectfully submitted,

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